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Benefits Administration Corporation

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RETIRED INDEPENDENT GUARDS
ASSOCIATION OF NEVADA, ET AL

Plaintiffs,

v.

BOARD OF TRUSTEES,
INDEPENDENT GUARDS
ASSOCIATION OF NEVADA-
WACKENHUT SERVICES
INCORPORATED PENSION TRUST
FUND; and

INDEPENDENT GUARDS
ASSOCIATION OF NEVADA, and
WACKENHUT SERVICES
INCORPORATED,

Defendants.

Case No.: 2:08-CV-00849-RLH-LRL

**BENEFIT ADMINISTRATION
CORPORATION'S MOTION FOR LEAVE TO
FILE SUR-REPLY IN OPPOSITION TO
PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR A PROTECTIVE
ORDER**

**BENEFIT ADMINISTRATION CORPORATION'S MOTION FOR LEAVE TO FILE
SUR-REPLY IN OPPOSITION TO PLAINTIFFS' REPLY IN SUPPORT OF THEIR
MOTION FOR A PROTECTIVE ORDER**

Defendant, Benefit Administration Corporation ("BAC" or "Defendant"), by and through its undersigned attorneys, Jackson Lewis LLP, Defendant BAC ("Defendant") moves for leave to file the attached Sur-reply in response to Plaintiffs' Reply in Support of its Motion for Protective order. The Sur-reply is necessary because Plaintiff's Reply contains inaccuracies and misstatements of law and fact regarding BAC's Opposition and position. This Motion is made and based on the attached Memorandum of Points and Authorities and any oral argument this Court deems appropriate.

Dated this June 10, 2011.

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**BENEFIT ADMINISTRATION CORPORATION'S SUR-REPLY
IN OPPOSITION TO PLAINTIFFS' REPLY
IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER**

Benefit Administration Corporation ("BAC") submits the following points to address the inaccuracies and defective arguments Plaintiffs have presented in their Reply Memorandum (Doc. No. 145):

- Plaintiffs have not and cannot deny that they failed to request or hold the required Rule 26-7 meet and confer conference, which alone requires denial of their motion.
- Plaintiffs have not and cannot deny that they failed to notify Defendants that Mr. Johns could not host depositions at his office (which BAC identified as the location for Plaintiffs' and their counsels' convenience) before moving for a protective order.
- Plaintiffs have not and cannot deny that they failed to submit a declaration which complies with LR 26-7 which unequivocally states, "**Discovery motions will not be considered** unless a statement of moving counsel is attached thereto certifying that, after personal consultation and **sincere effort** to do so, counsel have been unable to resolve the matter without court action." LR-26-7 (emphasis added). They also failed to submit an affidavit attesting for the need for an emergency decision on their motion for protective order as LR 26-7 requires.
- Plaintiffs have not and cannot deny that still they have failed to submit any evidence to support their conclusory claims of medical and financial inability to attend their depositions in Las Vegas, which the law requires, as demonstrated in BAC's Opposition Memorandum.
- Plaintiffs present blatantly false information when they claim that BAC that did not provide Plaintiffs ample time to create a deposition plan by noticing the depositions on May 16, 2011 without prior notice as demonstrated in BAC's Opposition Memorandum, which BAC requested beginning in March.
- No matter how much effort BAC would have put into trying to reach agreeable dates (which efforts already were more than reasonable), Plaintiffs were never going to voluntarily agree to appear for depositions. The entire history of their actions, including their recent pleadings, demonstrates that they believe BAC is not entitled to take their depositions.
- To the extent that Plaintiffs' counsel claims that BAC did not consider his caseload when setting depositions for two weeks straight, the deposition schedule was a product of Plaintiffs' counsel's refusal to cooperate and his informing BAC during the March 31 teleconference that he was available in June for depositions and Plaintiffs' counsel never raised any issue concerning the two-week block of depositions prior to the motion for protective order.

- 1 • Plaintiffs have not addressed the law BAC presented in its Opposition Memorandum
2 which requires actual evidence of hardship for them to meet their burden of proof for their
3 request for a protective order. The fact that Plaintiffs allegedly are on fixed incomes is a
4 nonsensical argument given that they have presented zero evidence to demonstrate the
5 amount of those fixed incomes.
- 6 • Plaintiffs have not addressed the law BAC presented in its Opposition Memorandum
7 which states that Plaintiffs are not entitled to provide discovery through means other than
8 their depositions only. BAC Opposition Memorandum demonstrates that it has every
9 right to take depositions of Plaintiffs in Las Vegas even if only to address their credibility
10 in preparation for trial which seems particularly important given counsel's claims that
11 they are easily confused. *Dieng v. Hilton Grand Vacations Co., LLC*, No. 2:10-cv-01723-
12 LDG-PAL (D. Nev. March 1, 2011)(Magistrate Judge Leen explaining the law and
13 denying motion for protective order), attached hereto as Ex. A.
- 14 • To the extent that Plaintiffs claim that depositions of the Nevada Plaintiffs should proceed
15 first, this is yet another issue Plaintiffs never raised with BAC as it should have prior to
16 filing their motion for protective order, which could have been resolved, and has zero
17 bearing on the current papers.
- 18 • To the extent that Plaintiffs claim that the depositions are intended to harass, it is a
19 mystery that Plaintiffs would take this position given that they: (1) never articulate why
20 BAC should not be entitled to face Plaintiffs first-hand during depositions to assess their
21 credibility; (2) have provided no written discovery responses or documents; and (3) have
22 claimed that over 500 class members did not receive annual funding notices and that BAC
23 should be penalized when the maximum penalty for such failure could reach tens of
24 millions of dollars.¹
- 25 • Plaintiffs' pejorative claims that BAC is "wolfishly steal[ing]" their rights through
26 contrived staggered discovery is utterly baseless. BAC never conspired with the Board to
27 stagger discovery to cause harm or delay and Plaintiff present zero evidence otherwise.
- 28 • Plaintiffs misstate the law when they claim that their testimony alone is sufficient for the
Court to render judgment for them or even create a genuine issue of material fact to defeat
summary judgment which they assert, apparently, as a way to keep this litigation alive.
To the contrary, the law requires only that a "plan administrator shall use measures
reasonably calculated to ensure actual receipt of the material by plan, participants,
beneficiaries and other specified individuals." *Comm. Workers of America v. Commcast
Cable Comm.*, No. 2:05cv950, 2008 U.S. Dist. LEXIS 20334, at *6-14 (W.D. Pa. March
12, 2008) (collecting cases around the country and explaining the standard on motion for
summary judgment). Whether Plaintiffs actually received the documents is of no
moment, and, even if the individual Plaintiffs testify that they never received the alleged

¹ ERISA Section 502(c) and corresponding regulations potentially allow up to \$110 per day per participant for a failure to provide annual funding notice assuming Plaintiffs can prove that BAC served as the Plan administrator and the conduct meets the Ninth Circuit's test for a penalty (\$110 per day for 577 alleged class members equals \$63,470 per day as a maximum potential penalty).

1 missing documents, that would not save them from summary judgment. *Id.* In fact, courts
 2 routinely grant summary judgment, where as Defendants will do here, a defendant submits
 3 testimony that it followed a reasonable procedure for providing the documents allegedly
 4 not received. *Id.* Here, as Defendants have explained to Plaintiffs, Defendants sent the
 5 alleged missing documents to the addresses on file for the same location that Plaintiffs
 receive their pension checks through first class mail, return receipt requested, which meets
 the required standard under ERISA. *Id.* Plaintiffs have not presented any evidence that
 the distribution procedure was insufficient.

- 6 • Regardless, Plaintiffs miss the point which is that their failure to provide discovery, take
 7 discovery, follow court rules, and act with candor requires dismissal as a sanction the
 8 Ninth Circuit Court of Appeals encourages without regarding to the strength or weakness
 of their claims.
- 9 • It is noteworthy that Plaintiffs again failed to follow court rules by filing their Reply
 10 Memorandum after the Court-ordered June 9, 2011 deadline without requesting leave to
 11 file or explaining the reason for their failure and now have requested oral argument in
 their reply without following procedural rules for such a request.
- 12 • Plaintiffs have submitted no evidence to support their unfounded claim that they requested
 13 Defendants' depositions on several occasions. BAC invites Plaintiffs to discuss their need
 14 for depositions and from whom and when. BAC also invites Plaintiffs to explain why
 15 they believe are entitled to depositions in addition to the written discovery requests (which
 they failed to serve until after BAC filed its motion for sanctions and are too late) when
 they claim BAC is not entitled to depositions in addition to written discovery.²
- 16 • Yet another example of Plaintiffs' disingenuousness is their citation to attorney Stein's e-
 17 mail in which he states that the BAC will work in good faith regarding discovery and to
 18 reach a revised briefing schedule which Plaintiffs apparently cite to insinuate BAC has
 19 failed to do something it promised. (Doc. 145, p. 7). To the contrary, that e-mail relates
 20 to the potential need for BAC to receive additional discovery if Plaintiffs present
 21 information in their supplemental class certification memorandum which they had not
 22 previously raised and does not relate in any manner to the issues before the Court

23
 24
 25
 26
 27 ² BAC does not concede that Plaintiffs are entitled to responses to their written discovery, which it believes
 28 Plaintiffs served too late. However, BAC is willing to discuss Plaintiffs' position concerning whether their discovery
 requests are incurably tardy which is BAC's current position. If Plaintiffs are entitled to written discovery responses,
 the question becomes why they should also be entitled to take Defendants depositions, which presumably will cover
 the same items as the written discovery.

- At the end of the day, Plaintiffs still have not presented any evidence that BAC served as the Plan's administrator as that term is meant under ERISA or that Plaintiffs did not receive the alleged missing documents, much less that there were not sent in a manner reasonably calculated to reach Plaintiffs.

Dated this July 10th, 2011.

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Benefits Administration Corporation

IT IS SO ORDERED.



UNITED STATES MAGISTRATE JUDGE
DATED: 6-30-11

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that the service of the foregoing
MOTION FOR LEAVE TO FILE SUR-REPLY was made this date by depositing a true copy
of the same for mailing, at Las Vegas, Nevada, addressed to:

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Dated this 10th day of June, 2011.

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An employee of JACKSON LEWIS LLP